81650-6

No. 25475-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TROY DEAN STUBBS,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Law Reviews, Journals and Treatises

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the defense motion to strike the aggravating circumstance from the Amended Information.

2. The trial court erred in finding the legislature intended for juries to make the determination of this specific aggravating circumstance—do the injuries in this case exceed the level necessary to satisfy the elements of assault in the first degree. (Finding No. 1, CP 92)

3. The trial court erred in concluding that the State is authorized to submit the aggravating circumstance to the jury. (Conclusion No. 1, CP 92)

4. The trial court erred in submitting Special Verdict Form "C" to the jury, which asked, "Did the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense?" (CP 90)

5. The statutory provisions for the aggravating circumstance are unconstitutionally vague, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

6. Even assuming that the special verdict regarding the aggravating circumstance could be properly submitted to the jury, the trial

court erred in failing to accord the aggravating circumstance a narrowing definition that would have saved it from constitutional infirmity.

7. The trial court erred in imposing an exceptional sentence of 40 years.

8. The trial court erred in including Mr. Stubbs' juvenile convictions as part of his criminal history to calculate his offender score.

Issues Pertaining to Assignments of Error

1. May an aggravating circumstance be used to justify an exceptional sentence, where the aggravating circumstance is inherent in an element of the offense?

2. Does the statute pertaining to the aggravating circumstance violate due process vagueness prohibitions?

3. Is the instruction on the aggravating circumstance unconstitutionally vague?

4. Should Mr. Stubbs' prior juvenile adjudications be excluded from his criminal history?

B. STATEMENT OF THE CASE

In the early morning hours of October 4, 2005, for reasons not fully revealed, Ryan Goodwin was stabbed in the neck by a knife, severing his spinal cord and resulting in complete paralysis below the point of the

injury. (RP 45-47, 149, 153)[1] Several witnesses testified that Mr. Stubbs was the perpetrator. (RP 135-36, 213, 251, 524)

Prior to trial, defense counsel filed a motion to strike from the Amended Information the aggravating factor that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. The crux of the argument was that an exceptional sentence could not be imposed based on the severity of the injuries because it is an element of the charged crime. (CP 36-56; 6/26/06 RP 12-19) The trial court denied the motion, finding "This is a fairly straightforward jury question and I don't have any business taking it away from the jury on a ... pretrial motion." (6/26/06 RP 21-23)

The jury was instructed in pertinent part:

> A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with a deadly weapon or by any force or means likely to produce great bodily harm or death.

(CP 75)

> To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the 4th day of October, 2005, the defendant assaulted Ryan Goodwin;

[1] Reference to the trial transcript will be RP, followed by the page number. Reference to the other two transcripts that were numbered separately will be either 6/26/06 RP or 9/7/06 RP, followed by the page number.

(2) That the defendant acted with intent to inflict great bodily harm;
(3) That the assault
    (a) was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death; or
    (b) resulted in the infliction of great bodily harm...

(CP 76)

> Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

(CP 79)

The jury convicted Mr. Stubbs of first degree assault while armed with a deadly weapon (General Verdict and Special Verdict Form "B"). (CP 87, 89) Specifically, the jury found that Mr. Stubbs assaulted Ryan Goodwin with a deadly weapon or by force or by means likely to produce great bodily harm or death, which resulted in the infliction of great bodily harm (Special Verdict Form "A"). (CP 88) The jury also found that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense (Special Verdict Form "C"). (CP 90)

At sentencing, the trial court found that two prior juvenile felonies would count toward Mr. Stubbs' criminal history, resulting in an offender score of six. (9/7/06 RP 51-53) The resulting standard range with the 24-month deadly weapon enhancement was 186-240 months. (CP 111) The

Court then imposed an exceptional sentence of 40 years (480 months), based on the jury's special verdict that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. (9/7/06 RP 57-58) This appeal followed. (CP 124-25)

C. ARGUMENT

Issue No. 1. The aggravating circumstance, that the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense, is inherent in the "great bodily harm" element of first-degree assault and may not be used to justify an exceptional sentence.[2]

The Washington Supreme Court has stated that "factors inherent in the crime – inherent in the sense that they were necessarily considered by the Legislature and do not distinguish the defendant's behavior from that inherent in all crimes of that type – may not be relied upon to justify an exceptional sentence." State v. Ferguson, 142 Wn.2d 631, 647-48, 16 P.3d 1271 (2001) (citing State v. Chadderton, 119 Wn.2d 390, 396, 832 P.2d 481 (1992)). Stated differently, "an enhanced sentence may not be based on those factors the Legislature necessarily considered in setting the

[2] Assignments of Error 1-4, 7.

sentence range for the *type* of offense." Chadderton, 119 Wn.2d at 395 (emphasis in original).

Appellate courts have repeatedly stricken exceptional sentences where the alleged "aggravating circumstance" inhered in the jury verdict for the underlying offense. State v. Dunaway, 109 Wn.2d 207, 218-19, 743 P.2d 1237 (1987) (planning is inherent in the premeditation element of first degree murder, thus may not be used to justify an exceptional sentence for the crime of first degree murder); State v. Gore, 143 Wn.2d 288, 320, 21 P.3d 362 (2001) (same) (*rev'd on other grounds*, State v. Hughes, 154 Wn.2d 118, 132, 110 P.3d 192 (2005); State v. Baker, 40 Wn.App. 845, 848-49, 700 P.2d 1198 (1985) (planning inherent in verdict for attempted first-degree escape); Ferguson, 142 Wn.2d at 648 ("deliberate cruelty" finding inhered in jury's verdict for assault by intentionally exposing the human immunodeficiency virus (HIV) to another person with intent to inflict bodily harm); State v. Armstrong, 106 Wn.2d 547, 551, 723 P.2d 1111 (1986) (burns inflicted on the 10-month-old victim by defendant's throwing boiling coffee on the child and plunging the child's foot in the coffee were injuries accounted for in the offense of second degree assault and could not justify an exceptional sentence); State v. Nordby, 106 Wn.2d 514, 519, 723 P.2d 1117 (1986)

(seriousness of bodily injuries could not justify exceptional sentence for vehicular assault because injuries were considered by the Legislature in setting the standard range for the offense); *accord*, State v. Cardenas, 129 Wn.2d 1, 6-7, 914 P.2d 57 (1996).

The rationale underlying these cases is that by defining an offense and assigning a certain seriousness level and sentence range to that offense, the Legislature necessarily took into consideration the potential for variances in conduct. "[T]he idea of a range, rather than a fixed term . . ., is to allow the judge some flexibility in tailoring the sentence to the person and crime before him; the court may impose any sentence within the range that it deems appropriate." Baker, 40 Wn.App. at 848.

The aggravating circumstance herein was contemplated by the Legislature in setting the standard ranges for first degree assault. The offense contains the element of great bodily harm, defined as "bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). After reviewing the definitions for the lesser degrees of bodily injury set forth in RCW 9A.04.110(4)(a)—"bodily injury" and (b)—"substantial bodily harm", it is clear that the "great bodily harm"

element of first degree assault encompasses either the intent or actual infliction of the most severe bodily injury short of death. Therefore, Mr. Goodwin's injuries, while severe, are evidently the type of injuries envisioned by the Legislature in setting the standard range. Consequently, the severity of injuries suffered cannot justify an exceptional sentence. *See* Cardenas, 129 Wn.2d at 6-7, 914 P.2d 57. The judgment should be vacated and the case remanded for resentencing within the standard range.

Issue No. 2. The statute pertaining to the aggravating circumstance violates due process vagueness prohibitions.[3]

The Fourteenth Amendment's due process vagueness doctrine has a twofold purpose: (1) to provide the public with adequate notice of what conduct is proscribed and (2) to protect the public from arbitrary or ad hoc enforcement. City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). A law violates due process vagueness prohibitions if either requirement is satisfied. Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990) (internal citation omitted). The party challenging the prohibition has the burden of overcoming the presumption of constitutionality. Id.

[3] Assignments of Error 5 and 7.

"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Laws which impart an uncommon degree of subjectivity to the jury's consideration of a fact are subject to invalidation on due process vagueness grounds. As the Supreme Court has stated, a criminal statute that "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," violates due process. Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

Here the instruction on the aggravating circumstance violated due process vagueness prohibitions because the requirement that the jury find Mr. Goodwin's injuries "substantially exceeded" those necessary to establish the elements of the offense is so subjective that it has no standard. The trial court could possibly have made the instruction less subjective by according the aggravating circumstance a narrowing construction. The Court's failure to do so doomed the instruction to such a degree of constitutional infirmity that reversal is now the only remedy.

Issue No. 3. The instruction on the aggravating circumstance was unconstitutionally vague.[4]

Prior to Blakely[5], based on the faulty premise that they involved matters of judicial sentencing discretion, due process vagueness challenges to aggravating circumstances were generally deemed "theoretically and analytically unsound" and thus not given serious consideration or rejected out of hand by the appellate courts of this state. *See e.g.* State v. Jacobsen, 92 Wn.App. 958, 966, 965 P.2d 1140 (1998); State v. Owens, 95 Wn.App. 619, 628-29, 976 P.2d 656 (1999).

> Because there is no constitutional right to sentencing guidelines--or, more generally, to a less discretionary application of sentences than that permitted prior to the Guidelines--the limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague. It therefore follows that the Guidelines cannot be unconstitutionally vague as applied to [the defendant] in this case. Even vague guidelines cabin discretion more than no guidelines at all. What a defendant may call arbitrary and capricious, the legislature may call discretionary, and the Constitution permits legislatures to lodge a considerable amount of discretion with judges in devising sentences.

Jacobsen, 92 Wn.App. at 966 (quoting United States v. Wivell, 893 F.2d 156, 159 (8th Cir. 1990)).

---

[4] Assignments of Error 6 and 7.
[5] Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

It was also assumed that because judges would factor their own awareness of the "typical" case into their assessment of whether an aggravating circumstance had been established, the subjectivity of certain aggravating circumstances would be minimized, further reducing the likelihood of a due process violation. Nordby, 106 Wn.2d at 518-19. Given the now-irrefutable proposition after Blakely that aggravating circumstances, as facts which increase punishment, operate as elements of a higher offense which must be found by a jury beyond a reasonable doubt, the due process vagueness inquiry must apply.

In the death penalty context, the Supreme Court has held a challenged provision is unconstitutionally vague in violation of the Eighth Amendment if it "fails to adequately inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)." Maynard v. Cartwright, 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). A vague sentencing factor creates "an unacceptable risk of randomness," Tuilaepa v. California, 512 U.S. 967, 974, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), and for this reason the "channeling and limiting of the sentencer's discretion. . . is a fundamental constitutional

requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Cartwright, 486 U.S at 362 (citations omitted).

The Court explained the rationale for its holding in Cartwright thusly:

> To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'

Cartwright, 486 U.S. at 364.

Here, by comparison, reasonable minds will differ on the quantum of evidence needed for injuries to "substantially exceed" what is necessary to establish the elements of first-degree assault. For example, some jurors may imagine that "great bodily harm" affecting more than one bodily part or organ will "substantially exceed" the level of bodily harm necessary to establish the elements of first-degree assault, while others may believe the requisite degree of injury is much greater. It is on these grounds that the trial court should have defined the aggravating circumstance or provided a limiting instruction to save it from constitutional infirmity.

Issue No. 4. Since Mr. Stubbs' prior juvenile adjudications do not come within the prior conviction exception to the Apprendi rule because he was not afforded the right to a jury trial in those convictions, they cannot be included in his criminal history.[6]

In State v. Weber, __Wn.2d__, 149 P.3d 646 (2006), our Supreme Court held that that prior juvenile adjudications fall under the "prior conviction" exception in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and are not facts that a jury must find under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Weber, __Wn.2d__, 149 P.3d at 648. However, the majority's holding is inconsistent with the United States Supreme Court's reasons for excluding prior convictions from the rule, and with statutes and case law from this state. Weber, __Wn.2d__, 149 P.3d at 660 (Madsen, J. dissenting).[7]

In Jones v. United States, 526 U.S. 227, 143 L.Ed.2d 311, 119 S.Ct. 1215 (1999), a case preceding Apprendi, the U.S. Supreme Court said that "unlike virtually any other consideration used to enlarge the

---

[6] Assignment of Error 8.

[7] A writ of certiorari to the U.S. Supreme Court is being filed in this matter within the next month. Since it is anticipated that the U.S. Supreme Court will accept review and reverse the majority opinion, Appellant makes this argument to properly preserve this issue.

possible penalty for an offense, ... a prior conviction must itself have been established through procedures satisfying *the fair notice, reasonable doubt, and jury trial guarantees*." Jones, 526 U.S. at 249, 119 S.Ct. 1215 (emphasis added). Thus, the prior conviction exception to the rule stated in Apprendi is premised on there having been specific constitutional safeguards underlying a prior conviction used to increase the punishment for a subsequent offense. Weber, __Wn.2d__, 149 P.3d at 661 (Madsen, J. dissenting). Therefore, in order to fall within the prior conviction exception to the rule in Apprendi, a juvenile adjudication must have had the same constitutional safeguards in place as in Jones, in particular the right to trial by jury and proof beyond a reasonable doubt. Id.

Other courts have reached this conclusion after carefully examining the Supreme Court's cases. In United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir.2001), the Ninth Circuit read Jones and Apprendi to mean that "the 'prior conviction' exception to Apprendi's general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt." If juvenile adjudications lack these due process guaranties, the court reasoned, they do not fall within the exception. Id. at 1194. Further, the Ninth Circuit said that insofar as the government

argued that the exception should be extended to include nonjury juvenile adjudications, the "Apprendi Court's serious reservations about the reasoning of Almendarez-Torres[8] counsel[ed] against any extension[s]." Id.; *see* Apprendi, 530 U.S. at 487, 489-90, 120 S.Ct. 2348 (noting that it was arguable that Almendarez-Torres was wrongly decided). Other courts have also held that juvenile adjudications do not fall within the prior conviction exception. State v. Harris, 339 Or. 157, 118 P.3d 236 (2005); State v. Brown, 03-2788 (La. 7/6/04), 879 So.2d 1276.

Finally, most commentators addressing this issue argue forcefully that a juvenile adjudication does not fall within the "prior conviction" exception to the Apprendi rule. Weber, __Wn.2d__, 149 P.3d at 663 (Madsen, J. dissenting). One says, in summary, that "[s]ince the juvenile system of justice was founded on the principle of rehabilitation, and continues to embrace the 'rehabilitative ideal' in modern times, there are significant constitutional differences in the degree of procedural due process and fundamental fairness involved in adult convictions and juvenile adjudications" and because "juvenile adjudications [are] subject to less stringent procedural standards than adult criminal proceedings," the Apprendi rule "must be limited to prior convictions that were themselves

[8] Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)

obtained through proceedings affording individual defendants the same procedural safeguards they would be entitled to in the adult criminal justice system." Stephen F. Donahoe, Note, *The Problem With Forgiving (But Not Entirely Forgetting) the Crimes of Our Nation's Youth: Exploring the Third Circuit's Unconstitutional Use of Nonjury Juvenile Adjudications in Armed Career Criminal Sentencing*, 66 U. PITT. L.REV. 887, 907 (Summer 2005); *see also* Kimberly L. Johnson, Note & Comment, *Should Juvenile Adjudications Count as Convictions for Apprendi Purposes?*, 20 GA. ST. U.L.REV. 791 (Spring 2004) (juvenile adjudications do not come within the prior conviction exception to the Apprendi rule; the juvenile system is different from the criminal justice system in that juvenile adjudications have a rehabilitative purpose and juveniles do not have the same rights as adults in the criminal justice system, in particular the right to trial by jury).

In fact, it is because of the fundamental difference between the juvenile justice system and the criminal system that the United States Supreme Court and this state's appellate courts have held that there is no right to a jury trial in the juvenile justice system. Weber, __Wn.2d__, 149 P.3d at 662 (Madsen, J. dissenting) (citations omitted). In contrast, the

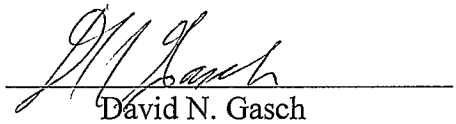
criminal justice system is primarily punitive. Monroe v. Soliz, 132 Wn.2d 414, 420, 939 P.2d 205 (1997).

Herein, Mr. Stubbs' prior juvenile adjudications do not come within the prior conviction exception to the Apprendi rule because he was not afforded the right to a jury trial in those convictions. Therefore, his prior juvenile convictions cannot be included in his criminal history.

D. CONCLUSION

For the reasons stated, this case should be remanded for resentencing for the imposition of a sentence within the standard range based on a lower offender score that does not include prior juvenile convictions.

Respectfully submitted April 9, 2007.



David N. Gasch
Attorney for Appellant
WSBA #18270